Supreme Court, U.S.
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No. 93-357

In The

Supreme Court of the United States

October Term, 1993

LEE KRUEGER AND MARY DELACOUR,

Petitioners,

vs.

DON FUHR,

Respondent.

On Petition For Writ of Certiorari To The United States Court Of Appeals For the Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals followed the substantive law established in *Tennessee v. Garner*, 471 U.S. 1 (1985), in sustaining Respondent's Motion for Summary Judgment on the basis that the Respondent police officer's use of deadly force to apprehend a fleeing suspect was objectively reasonable within the meaning of the Fourth Amendment, where Respondent police officer had probable cause to believe the suspect had committed a dangerous felony involving the threatened infliction of serious physical harm, the Respondent officer reasonably believed the suspect was armed with a knife and posed a threat of serious physical harm to the officer or others, and the use of deadly force was necessary to prevent the suspect's escape.

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May it Please the Court:

COUNTER STATEMENT OF THE CASE

Summary of Facts

Although Petitioners have set forth their view of the case, the United States Court of Appeals for the Eighth Circuit objectively found the facts to be as follows:

> In the early morning hours of June 6, 1989, Officer Don Fuhr was on patrol duty. By radio transmission, Officer Fuhr was informed that an assault had occurred at the Tri-States Laundry

and that the suspect was a "white/male wearing black shirt with number 12 on it and bluejeans," and "will be armed with a knife." (Joint Appendix at 195). The dispatcher also stated that canine security was possibly in pursuit of the suspect. A subsequent radio transmission indicated that the suspect's name was Leon Krueger and that he was possibly an escapee from Alpha House, a residential halfway house in Springfield, Missouri. (Joint Appendix at 198). Another officer communicated the suspect's probable location and stated that he was "suppose [sic] to be on drugs and very high and had some type of knife on him." (Joint Appendix at 199). Shortly thereafter, a second officer announced that the suspect had probably been spotted in the 1000 block of East Walnut.

Responding to this information, Officer Fuhr drove his police vehicle onto East Walnut. There he observed an individual fitting the description of the Tri-States Laundry assailant lying on his stomach between two parked automobiles. This individual was later identified as Leroy Krueger. Officer Fuhr exited his police vehicle, drew his service revolver, identified himself as a police officer and ordered Krueger to freeze. At that time, Leroy Krueger did not have a knife in his hand nor did Officer Fuhr notice a knife anywhere on Krueger's person.

Leroy Krueger began running down East Walnut and Officer Fuhr chased him for approximately 210 feet. Several times during this pursuit, Officer Fuhr ordered Krueger to freeze. When the officer had closed to within 3 to 4 yards of Krueger, he saw Krueger reach to the area of his right hip. He heard the sound of an

> object being pulled from Krueger's waistband area. Officer Fuhr testified at his deposition that Krueger pulled a knife from his waistband and was gripping it in his fist.
>
> Officer Fuhr further testified that he believed that Krueger was going to turn and attack him with the knife. Officer Fuhr had been running "as fast as [he] could run" (Joint Appendix at 48) and was fearful that he would be unable to stop in time to avoid the attack. Officer Fuhr slowed down, leveled his service revolver and fired four rounds at the center mass of Leroy Krueger's body. Two rounds struck Leroy Krueger in the back, a third round hit him in the base of the skull. Leroy Krueger died as a result of the wound to the base of the skull. During the subsequent investigation, a Springfield police officer found a knife with an exposed blade approximately 43 feet from the point where Krueger's right foot came to rest on the sidewalk.

Krueger v. Fuhr, 991 F.2d 435 at 436-437 (8th Cir. 1993), Appendix to Petition, A-1 through A-3.

Respondent believes the proof raises no factual issues material to *certiorari* even upon full briefing. The facts relied upon by the court below are uncontroverted. However, mindful of the obligation imposed by Rule 15.1, this response will point out some of the erroneous statements of fact contained in the petition including the following:

Clarification or Distinction of Other Facts

(1) Petitioner's statement [Petition, p. 5] that at the time Officer Fuhr raised his service revolver and fired

four shots into the center mass of Leroy Krueger's body, "it was obvious that [he] was going to catch him," is taken out of context and misleading. Officer Fuhr's comment that he was going to catch Mr. Krueger in the foot pursuit was made at the end of a sentence wherein he was explaining why Mr. Krueger pulled a knife when the officer had closed to within three to four yards. Officer Fuhr testified at his deposition as follows:

> I realized that I was much too close to him, because I could not stop. If he stopped, my reaction time would not be quick enough that I would not run right up into him with the knife. I immediately then began to bring up my revolver due to the fact of the way he drew the knife. It was a very deliberate and intentional act. It was reach and pull, just like this, and he had it in his hand, gripped in his fist. When I saw him do that, I believed that he was immediately going to turn on me, and that's why he had drawn the knife, because I had caught up with him and it was obvious that I was going to catch him." (J.A. at 49, 50)

(2) Petitioner's assertion (Petition, p. 6) that Mr. Krueger "apparently had been unarmed when he was shot to death," is unsupported by any facts, is pure conjecture and argumentative. To the contrary, Officer Fuhr testified he observed a knife in Mr. Krueger's hand and gave a detailed description of it. (J.A. at 86). Additionally, Officer Fuhr testified that he never saw Mr. Krueger toss the knife in any direction prior to discharging his service revolver. (J.A. at 54).

It is uncontested that a knife was found at the scene which matched Officer Fuhr and John Schmidt's description of the knife they saw in Mr. Krueger's hand immediately prior to the shooting. (J.A. at 223, 228).

ARGUMENT: REASONS FOR DENYING THE WRIT

I. THE PETITION RAISES NO SPECIAL OR IMPORTANT QUESTIONS, AND NO EXTREME DEPARTURES FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT REQUIRE THIS COURT'S INTERVENTION.

The petition should be denied because it totally lacks any "special and important reasons" for granting it, as required by Rule 10.1 of this Court. This case presents no new questions of law. It presents no substantial federal constitutional issue of novelty or interpretation. There is no conflict between the judgment of the Eighth Circuit for which review is sought and any decision of another Court of Appeals. Nor has the Eighth Circuit in its judgment "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision," as specified in Rule 10.1(a) of this Court.

This is a routine civil rights case involving the issue of whether a police officer's use of deadly force to apprehend a fleeing felony suspect was objectively reasonable within the meaning of the Fourth Amendment. The appropriateness of the substantive law relied upon by the Court of Appeals in granting summary judgment in favor of Respondent, *Tennessee v. Garner*, 471 U.S. 1 (1985), is

not in dispute, and indeed the petition cites no erroneous statements of law on the part of the Eighth Circuit. By no means have Petitioners demonstrated a violation of their Seventh Amendment right to a jury trial, for the Court of Appeals backed its reversal of the District Court with solid legal reasoning based on proper standards of review and basic principles of civil rights law on which there is no controversy. This is a particularly inappropriate case for the granting of a writ of *certiorari*.

II. THE COURT OF APPEALS' DECISION FOLLOWED PROPER STANDARDS OF REVIEW AND CONSIDERED ALL MATERIAL FACTS IN A LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT.

In the first point of the Petition for Writ of Certiorari Petitioners assert that the decision of the Eighth Circuit failed to consider certain "contradictory" facts in a light most favorable to Petitioners. This is the same shop-worn lament presented in petitions for certiorari any time a court of appeals finds it necessary to grant summary judgment in favor of a respondent. Although Petitioners cite no erroneous statements of law or the application of an improper standard of review by the Court of Appeals, nevertheless they attempt to preserve their Fourth Amendment claim that Officer Fuhr utilized excessive force in effecting the arrest of Leroy Krueger by pointing to bits and pieces of the record that may or may not reflect some "metaphysical doubt" about whether Mr. Krueger was armed with a knife at the time of the shooting.

For example, Petitioners' contention that the knife was not found where it might be expected to be in relationship to where the decedent's body ultimately came to rest is based on speculation and is legally insufficient to preclude summary judgment in this case. Officer Fuhr testified in his deposition that he observed Mr. Krueger pull out a knife when he closed to within three yards of the suspect during the foot pursuit. (J.A. at 37-38). He further testified that he constantly observed Mr. Krueger and did not notice him throw the knife prior to the time he fired his weapon. (J.A. at 52-53). It is uncontradicted that a knife was found at the scene of the shooting, which Officer Fuhr and other witnesses identified as the knife they observed in Mr. Krueger's hand immediately prior to the shooting.

In defining the standard for the granting of summary judgment pursuant to Federal Rule of Civil Procedure 56(c), this Court has recognized that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). The "mere existence of a scintilla of evidence" is insufficient; "there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252, 106 S.Ct. at 2512. Accordingly, Petitioners must do more than simply show there is some "metaphysical doubt" as to the material facts. *See, Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

In the instant case, the Eighth Circuit correctly recognized that "[The] substantive law determines which facts

are relevant and which are immaterial." The Court of Appeals also acknowledged the principle established by this Court in *Anderson v. Liberty Lobby*, that "only disputes that might affect the outcome will properly preclude summary judgment. *Id.* at 248." Appendix to Petition, A-4.

The Eighth Circuit correctly applied these legal principles when it specifically considered the disputed facts raised by petitioners regarding whether Mr. Krueger was armed at the time of the shooting. Petitioners' post mortem analysis [Petition, p. 9] that the knife was found approximately one and one-half hours after the shooting by an officer who himself has been involved in a similar shooting or that Officer Fuhr never looked for a knife near Mr. Krueger's body after the shooting are insufficient to create a genuine dispute of material fact. Petitioners' contentions regarding who found the knife, as well as when and where it was found, are all circumstances which occurred *after* the shooting. The Eighth Circuit specifically noted that such innocuous facts are neither material or outcome determinative to a determination of whether Officer Fuhr's perceptions and actions *at the time* of the shooting were objectively reasonable. The Court of Appeals recognized the well established standard that the reasonableness of a particular use of force must be "assessed from the point of view of a reasonable officer on the scene" forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving, "rather than from the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 396 at 396, 109 S.Ct. 1865 at 1872 (1989). Appendix to Petition, A-7.

The Court of Appeals then correctly concluded that based upon the undisputed facts, Officer Fuhr's belief that he was facing an armed and dangerous suspect was objectively reasonable, and as a result, even if it is assumed that Mr. Krueger was unarmed at the time of the shooting, that fact alone would not preclude entry of judgment for Officer Fuhr. Appendix to Petition, A-7.

The Court specifically pointed out that the argument advanced by Petitioners demonstrated that they "misapprehend the nature of the Fourth Amendment reasonableness inquiry." Appendix to Petition, A-7. Petitioners still do not seem to get the point, for they continue to ignore the principle that a police officer's "erroneous perception or belief does not violate the Fourth Amendment if such perception or belief is objectively reasonable." *Graham v. Connor*, 490 U.S. 386, at 396.

It is noteworthy that many of the facts Petitioners refer to in their petition as the basis for their assertion that "material" facts are in dispute were not raised, briefed, or argued by Petitioners to either the District Court or the Court of Appeals. Indeed, the District Court only noted two facts in its Opinion it believed created genuine issues of material fact, namely: (1) the distance that the knife was found from the body, and (2) the fact that three bullets struck Krueger in the back." The Eighth Circuit specifically explained in its Opinion how neither of these facts were material to a determination of whether Officer Fuhr's actions were objectively reasonable under the Fourth Amendment. (Petition, p. A-6,A-7).

This case was properly decided upon the facts and the law, and the Court of Appeals fully considered all the

issues raised in the Petition for Writ of Certiorari. A decision by this Court thus would be definitive only as to these parties and to like narrow cases presenting these unique facts. Accepting this case would produce rather than remove uncertainty and start a parade of later petitions to this Court. Just as a decision to reverse or restudy the application of the objective reasonableness standard in the context of the Fourth Amendment would promote rather than resolve conflict, a decision to affirm would add little or nothing to the existing body of law on the subject of when a law enforcement officer is authorized to use deadly force to apprehend a fleeing felony suspect.

Accordingly, certiorari should be denied.

III. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT THERE WERE NO MATERIAL FACTS IN DISPUTE AS TO WHETHER THE RESPONDENT POLICE OFFICER ACTED IN AN OBJECTIVELY REASONABLE MANNER IN USING DEADLY FORCE TO APPREHEND LEROY KRUEGER FOR THE REASON THAT RESPONDENT HAD PROBABLE CAUSE TO BELIEVE THAT KRUEGER POSED A THREAT OF SERIOUS PHYSICAL HARM TO RESPONDENT OR OTHERS, THAT DEADLY FORCE WAS NECESSARY TO PREVENT KRUEGER'S ESCAPE, AND A WARNING TO STOP HAD BEEN GIVEN TO KRUEGER BY RESPONDENT.

The Eighth Circuit Court of Appeals held that the undisputed material facts establish that Officer Fuhr's use of deadly force to apprehend Leroy Krueger was reasonable and did not violate his Fourth Amendment rights. Contrary to Plaintiffs' assertion that the Court of

Appeals erred in granting summary judgment in favor of Officer Fuhr, this holding is consistent with the standards of this Court with respect to when the use of deadly force by a police officer to apprehend a suspect fleeing from the commission of a felony is authorized.

In *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), this court conclusively declared the substantive law under the Fourth Amendment with respect to the rights of persons suspected of committing violent crimes who are fleeing from apprehension by a law enforcement officer, and who have been warned to halt. In *Garner*, this court held that the use of deadly force to apprehend a fleeing felony suspect is constitutionally permitted and reasonable in certain circumstances:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given to him."

Garner, 471 U.S. at 11-12.

Much of the second point of the Petition for Writ of Certiorari is devoted to an argument that the Court of Appeals erred in holding Officer Fuhr's use of deadly force to apprehend a fleeing felony suspect was constitutionally reasonable for the reason that they dispute: (1)

whether Mr. Krueger threatened the officer with a weapon and (2) whether deadly force was necessary to prevent Krueger's escape. In directly addressing each of these contentions, the Eighth Circuit noted that it is undisputed that at the time of the shooting, Leroy Krueger was fleeing from apprehension by a Springfield, Missouri police officer. Appendix to Petition, A-8. The Court also stated that it is undisputed that during the foot pursuit Officer Fuhr knew "that a man fitting Krueger's description was suspected of committing an armed assault at the Tri-States Laundry." and "the suspect probably had a knife and was inebriated." Appendix to Petition, A-6. Despite the uncontradicted evidence establishing that Krueger had committed a crime involving the infliction or threatened infliction of serious physical harm, the Eighth Circuit addressed Petitioners' contention that Krueger was not armed by averting to this Court's statement in *Graham* that "an erroneous perception or belief does not violate the Fourth Amendment if such perception or belief is objectively reasonable", *Graham*, 490 U.S. at 396.

The Eighth Circuit correctly concluded that based upon the radio transmissions informing Officer Fuhr that the individual he was chasing had committed a crime involving the infliction or threatened infliction of serious physical harm and that he will be armed with a knife, Officer Fuhr's belief that he was facing an armed and dangerous suspect was "objectively reasonable". Appendix to Petition, A-7. The Court of Appeals went on to explain that even if it is assumed *arguendo* "that Plaintiffs were able to establish that Krueger was not armed at the time of the shooting, that fact would not preclude entry

of judgment in favor of Officer Fuhr because "[it] was objectively reasonable for Officer Fuhr to believe on the basis of this information he faced a serious and immediate danger of physical harm when Leroy Krueger pulled, or seemed to pull, a knife from his waistband." Appendix to Petition, A-6.

This Court in *Garner* suggested that there are two basic situations which create the requisite "probable cause" which justifies a police officer's belief that a fleeing felony suspect poses a threat of serious physical harm to himself or others: [1] "The suspect threatens the officer with a weapon" *or* [2] there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm . . . " *Garner*, 471 U.S. at 11, 105 S.Ct. at 1701 (emphasis added). In regard to the first situation, Officer Fuhr's uncontroverted testimony established that he had probable cause to believe Krueger posed a threat of serious physical harm to him when he observed Mr. Krueger pull out a knife as he closed to within three yards of the suspect during a foot pursuit in which he was running as fast as he could. (J.A. at 37-38).

The latter situation which *Garner* establishes as justifying a police officer's belief that a fleeing felony suspect poses a threat of serious physical harm to the officer or others does not require that the officer's life actually be threatened by the suspect with the weapon. Rather, the officer is allowed to infer that the suspect is inherently dangerous by the violent nature of the crime he is believed to have committed. Petitioners have admitted in their petition that Officer Fuhr "had probable cause to believe Leroy Krueger had committed a crime involving

the threatened infliction of serious physical harm." (Petition, p. 11). Irrespective of whether this Court chooses to accept Officer Fuhr's uncontradicted testimony that he believed his life was threatened when Mr. Krueger pulled a knife as he was attempting to apprehend him during a foot pursuit, the Eighth Circuit properly held under the standards of *Garner* that Officer Fuhr was reasonably justified in believing that the suspect he was chasing posed a threat of serious physical harm to himself or others as a result of the radio transmissions and Petitioners' admission that "Leroy had committed a crime involving the threatened infliction of serious physical harm." (Petition, p. 11).

Citing *Samples on Behalf of Samples v. Atlanta*, 846 F.2d 1328 (11th Cir. 1988), Petitioners assert [Petition, p. 15] that the fact Krueger was shot in the back raises a genuine issue of material fact as to whether Officer Fuhr was threatened with a weapon. The Eighth Circuit held this argument to be without merit and discussed at length why the facts of *Samples* were clearly distinguishable from those in the instant case. In noting that under the undisputed facts of this case, "it is not remarkable that an escaping felony suspect would be shot in the back", the Court of Appeals concluded "there is no evidence that requires us to attribute special significance to the fact that Officer Fuhr shot Krueger in the back." Appendix to Petition, A-7 through A-8. Accordingly, the Eighth Circuit correctly applied the legal standards of *Garner* in concluding that the first prong of the *Garner* test had been satisfied.

The balance of the Petition for Writ of Certiorari is devoted to a discussion of the second prong of the *Garner*

test, namely: whether the use of deadly force was necessary to prevent Krueger's escape. The Eighth Circuit recognized and followed the proper legal standards in concluding that "Officer Fuhr's use of deadly force was necessary to prevent escape in accordance with the standards enunciated in *Garner*." Appendix to Petition, A-8. After stating that it was undisputed that Krueger was fleeing police apprehension at the time of the shooting, and acknowledging that other officers were in the general area, the Court of Appeals pointed out that it was not a certainty that another officer might have apprehended Krueger if he eluded Officer Fuhr's foot pursuit. The Court of Appeals recognized the controlling legal principle that: "The Fourth Amendment does not require police officers to forgo the use of deadly force to prevent their own death or serious physical injury whenever there is a possibility that another officer might later apprehend the fleeing suspect. *See, e.g. Fraire v. Arlington*, 957 F.2d 1268, 1276 (5th Cir.) cert. denied, ___ U.S.___, 113 S.Ct. 462, 121 L.Ed.2d 371 (1992)." Appendix to Petition, A-8.

Acceptance of Petitioners' assertion that a police officer may never employ deadly force unless attacked by a suspect possessing a deadly weapon would place a police officer in a dangerous and unreasonable situation. *See, Ryder v. City of Topeka*, 814 F.2d 1412 (10th Cir. 1987). Absent the use of deadly force, Officer Fuhr would have either been stabbed or Krueger would have escaped in the darkened residential neighborhood to continue his deadly doings. Under the totality of the circumstances, the Court of Appeals properly concluded that a reasonable officer could well fear for his safety and that of others, and, accordingly, "Officer Fuhr's use of deadly

force was necessary to prevent escape in accordance with the standards enunciated in *Garner*." Appendix to Petition, A-8.

Nevertheless, Petitioners cite a Sixth Circuit case, *Washington v. Newsom*, 977 F.2d 991 (6th Cir. 1992), to support their contention that the Eighth Circuit should not have granted summary judgment as a matter of law in favor of Officer Fuhr. This case is distinguishable from the case at bar and does not indicate a conflict which would warrant the attention of this Court. In *Washington*, a police officer shot the driver of an automobile as he was fleeing the scene and did not have any information that the driver was armed or dangerous. Although a passenger was reported to have a rifle, the officer admitted that at the time he fired his weapon he did not see any firearm in the hands of the fleeing driver. Moreover, at the time of the shooting, it was daylight and the car was in an open parking lot surrounded by five police officers. In the case at bar, however, there is undisputed evidence to justify Officer Fuhr's belief that the suspect he was pursuing through a darkened residential neighborhood had just committed an armed assault at a nearby business and was reportedly armed with a knife and dangerous. Unlike the officer in *Washington*, Officer Fuhr testified at his deposition that at the time of the shooting he observed a knife in Krueger's fist, and due to his close proximity to the subject, he was in immediate fear of bodily injury. Additionally, Officer Fuhr was alone in his pursuit of Krueger, whereas five officers had surrounded the suspect in *Washington*.

Contrary to the Petitioners' assertion, the court in *Washington* did not hold that all cases involving a law

enforcement officer's use of deadly force to apprehend a fleeing felony suspect must be submitted to a jury. Instead, the court in *Washington* merely concluded that under the unique facts of that case, there were material facts in dispute which should be submitted to the trier of fact. In the instant case, however, the Eighth Circuit followed the legal standards of *Garner* in granting summary judgment in favor of Officer Fuhr on the basis that there were no material facts in dispute. Petitioners' assertion that there is a conflict between the Circuits is nonsense.

Finally, the Eighth Circuit found and Petitioners concede that Officer Fuhr gave Leroy Krueger the feasible warnings for utilizing deadly force as required by the third prong of the *Garner* test. (Petition, p. 11, A-9).

CONCLUSION

The Eighth Circuit correctly followed the standards of review governing summary judgment and the substantive law set down in *Tennessee v. Garner*, 471 U.S. 1 (1985), in determining that the undisputed material facts of record establish that Officer Fuhr acted reasonably within the context of the Fourth Amendment's "objective reasonableness" standard. The decision below does not conflict with any principles of law, with decisions of other circuits or with proper standards of review. The decision affects only these parties and these particular claims. It does not purport to set any precedent, important or otherwise. Moreover, Petitioners have not presented supportable arguments for any issues that would require review of the well established principles of *Garner* by this

Court. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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